Small Group: Anti-Suit Injunctions in the Context of International Arbitration

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Presentation Overview

A. Learning Objectives

This small group discussion analyzes approaches followed by U.S. courts with regard to the granting of anti-suit injunctions. There is currently a Circuit split, with the courts following three approaches: (a) conservative; (b) liberal; and (c) "alternative." We will also discuss the United Kingdom's approach, as compared to other European jurisdictions, and the reasoning of the European Court of Justice in Turner v Grovit.

B. Content

The appropriate use of anti-suit injunctions is controversial around the world. In the U.S.. such injunctions are frequently used and are valued as a tool to protect the jurisdiction of the issuing courts and to prevent litigants from frustrating important public policies (favoring arbitration, for instance).

(i) Definition

An anti-suit injunction is one that prevents a litigant from pursuing litigation before a foreign tribunal. U.S. v. Davis, 767 F.2d 1025, 1036 (2d Cir. 1985).

(ii) Origins

Anti-suit injunctions were essentially an invention of the English courts to regulate the distribution of cases among domestic courts. As in England, anti-suit injunctions began in the U.S. as a domestic tool and were later applied internationally.

(iii) Basic Elements for the Application of Anti-Suit Injunctions in the U.S.

All U.S. courts, including adherents to the differing approaches outlined below, will only grant an anti-suit injunction where the following two prerequisites are met:

> The parties are the same in both matters; and
>
> The resolution of the case before the enjoining court would be dispositive of the action to be enjoined.

Comity requires that anti-suit injunctions be used sparingly. See, e.g., Goss Int'l Corp. v. Tokyo Kikai Seisakusho, 435 F. Supp. 2d 919, 925 (N.D. Iowa 2006) (noting that the power to issue anti-suit injunctions should not be "exercise[d] lightly or with abandon"); Quaak v. Klynveld Peat Marwick Goerdeler Bedriffsrevisoren, 361 F.3d 11, 16 (1st Cir. 2004) (noting that courts must "accommodate conflicting, mutually inconsistent national policies without unduly interfering with the judicial processes of a foreign sovereign").

Further, U.S. courts are sensitive to timing issues. Actions for anti-suit injunctions brought promptly are more likely to succeed.

A. The Liberal Approach (5th, 7th and 9th Circuits)

Under this approach, courts will issue anti-suit injunctions when the litigation to be enjoined is "vexatious" or "oppressive" or would involve inequitable hardship. They may also do so where the foreign litigation would frustrate an important public policy, threaten the court's jurisdiction over property, or cause other fundamental unfairness.

B. The Conservative Approach (1st, 2nd, 3rd, 6th and DC Circuits)

According to this approach, anti-suit injunctions should be issued only where there is a strong reason for issuing the injunction, such as an interference with the

jurisdiction of the enjoining court or a threat to an important public policy of the enjoining forum.

C. The "Alternative" Approach (1st Circuit; perhaps a subset of the Conservative Approach)

Courts following this approach will only issue such an injunction if, having considered all the facts and circumstances relevant for the case, issuing the injunction is proper. Circumstances typically considered include: nature and procedural posture of the two actions, conduct of the parties, importance of any public policies at stake, and the extent to which the foreign action has the potential to undermine the court's ability to reach a just and speedy result.

(iv) Additional Elements

Some courts (such as the 8th Circuit) require the movant to establish:

> the likelihood of success on the merits;
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> the threat of irreparable harm without the injunction;
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> that the harm to be suffered is greater than the injury that the injunction would inflict on other parties; and
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> that the injunction is in the public interest.

However, other courts (including the 5th Circuit) do not require the movant to demonstrate the likelihood of success on the merits, but only that the relevant factors weigh in favor of the injunction.

(v) Anti-Suit Injunctions in the Context of Arbitration in the U.S.

In the arbitration context, courts issue anti-suit injunctions according to the same criteria used for regular anti-suit injunctions. In the US, because of the general federal policy in favor of arbitration, even those courts applying a

restrictive/conservative approach acknowledge that the public policy in favor of arbitration is sufficiently strong to justify enjoining foreign proceedings brought to frustrate the arbitral process.

In the context of international commercial arbitration, U.S. courts will enjoin:

> a foreign court proceeding commenced in breach of an arbitration agreement;
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> an arbitration that was commenced without an arbitration agreement;
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> a proceeding to set aside an arbitral award; or
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> the enforcement of an arbitral award.

(vi) Anti-Suit Injunctions in the Context of Arbitration in the U.K.

In the U.K., courts ordinarily grant anti-suit injunctions where required by considerations of justice and in particular to restrain breaches of arbitration agreements. As in the U.S., U.K. courts will grant anti-suit injunction where they are sought promptly and before the foreign proceedings are too far advanced.

(vii) Anti-Suit Injunctions in the Context of Arbitration in the European Union

The European Court of Justice has outlawed the granting of anti-suit injunctions restraining proceedings commenced in European Union member states. In Turner v. Grovit, the Court found that anti-suit injunctions within the European Union, even those targeting private parties rather than the courts of a fellow EU member state, impermissibly interfere with the system of jurisdiction and abstention established by the Brussels Convention (now Council Regulation (EC) No 44/2001). Even concerns that a competing proceeding is manifestly unjust do not justify interfering with the rules of the Convention.

This decision however, does not preclude all anti-suit injunctions issued by the English courts. They remain free to enjoin proceedings outside the EU, where

consistent with English law. Also, since the Brussels Convention expressly excludes arbitration from its scope, some courts have found that the English courts remain free to enjoin foreign proceedings within the EU, which would violate an arbitration clause.

Civil jurisdictions are generally reluctant to grant anti-suit injunctions, which are viewed as an unjustified interference with the workings of foreign courts or tribunals.

(viii) Conclusions: Is There a Correct Approach?

Should courts preserve the value of exclusive jurisdiction clauses (e.g., arbitration clauses) not merely by a restraining injunction but also by taking appropriate steps to remove any advantages gained by a party in breach?

Or instead, should the courts be aware of the dangers of groundless parochial fears about proceedings in unfamiliar overseas courts, in an era in which the public policy need for judicial cooperation in cross-border commercial litigation is, perhaps, stronger than ever before?